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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DUSTIN BETTGE,

Defendant and Appellant.

B286584

(Los Angeles County  
Super. Ct. No. NA106699)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard M. Goul, Judge. Remanded and Affirmed.

Taylor Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, and Steven D. Matthews, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted appellant Dustin Bettge of first degree burglary (Pen. Code, § 459).<sup>1</sup> He admitted a prior strike conviction (§§ 667, subd. (d), 1170.12, subd. (b)), and a prior serious felony conviction (§ 667, subd. (a)) and was sentenced to a term of 13 years in state prison, including a five-year enhancement under section 667, subdivision (a) for his prior serious felony conviction.

He appealed from the judgment of conviction. On appeal, his appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. After our initial review, we requested and received supplemental briefing from the parties on whether the case should be remanded for the trial court to exercise its discretion under Senate Bill No. 1393 (effective January 1, 2019) to strike the section 667, subdivision (a) enhancement. In the meantime, we received a copy of a minute order from the superior court which reflects that it interpreted our request for supplemental briefing as effecting a remand. According to the minute order, the court reconvened for resentencing with the defendant present, represented by counsel, and expressly declined to exercise its discretion to strike the section 667, subdivision (a) enhancement.

We conclude that a remand is still required. The court's resentencing proceeding was void, because the court lacked jurisdiction to act while the case was on appeal. Thus, although we understand that the court has already indicated how it will rule, a remand for a

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<sup>1</sup> The jury found not true the allegation that a person was present in the commission of the crime (§ 667.5, subd. (c)). Unspecified statutory references will be to the Penal Code.

legally effective ruling is still required. We otherwise affirm the judgment.

## **BACKGROUND**

Appellant was captured on security video tape, which was played at trial, breaking into the attached garage of a house owned by Katherine Della Donna around 2:30 a.m. on May 18, 2017. He stole a bicycle worth about \$1,000. Residing at the house at the time was Jonathan Harris, Donna's nephew.

As part of the investigation, Long Beach Police Officer Johnny Dodson, whose assignment involved providing services to the homeless, viewed the video and recognized appellant as a homeless person with whom he had had several contacts between January 2017 and May 18, 2017. Among other things, he had talked to appellant about where he could go for food and shelter and about his drug addiction. Officer Dodson located defendant and placed him under arrest. Officer Dodson never found the stolen bike.

## **DISCUSSION**

In response to our request for supplemental briefing, appellant contends that the case must be remanded for the trial court to exercise its discretion whether to strike the section 667, subdivision (a) enhancement based on the enactment of Senate Bill No. 1393, effective January 1, 2019, which deleted former subdivision (b) of section 1385, thereby giving the trial court the discretion (which it previously did not have) to strike the enhancements under section 667, subdivision (a).

Because appellant's case is not final on appeal, the legislation applies retroactively to his case.

In the analogous situation involving the enactment of Senate Bill No. 620, which gave the trial court discretion to strike firearm enhancements under section 12022.5 and 12022.53, courts have held that a remand to allow the trial court to exercise that discretion "is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear indication of a trial court's intent, remand is required when the trial court is unaware of its sentencing choices." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; see *People v. McDaniels* (2018) 22 Cal.App.5th 420, 426-428; *People v. Chavez* (2018) 22 Cal.App.5th 663, 713; *People v. McVey* (2018) 24 Cal.App.5th 405, 419.) Here, the record contains no such clear declaration. As respondent concedes, the case must be remanded.

As we have noted, we have received a copy of a minute order from the superior court which reflects that it interpreted our request for supplemental briefing as an order remanding the case. The court reconvened for resentencing with the defendant present, represented by counsel, and expressly declined to exercise its discretion to strike the section 667, subdivision (a) enhancement. Unfortunately, the proceeding is void. "Subject to limited exceptions, well-established law provides that the trial court is divested of jurisdiction once execution of a sentence has begun. [Citation.] . . . This rule protects the appellate court's jurisdiction by protecting the status quo so that an appeal is not

rendered futile by alteration. [Citation.] As a result of this rule, the trial court lacks jurisdiction to make any order affecting a judgment, and any action taken by the trial court while the appeal is pending is null and void.” (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 923.) There are certain exceptions, but none applies here.<sup>2</sup> We are not insensitive to the interest in preserving scarce judicial resources. However, because the resentencing proceeding held while the appeal was pending is void, it has no legal effect, and cannot constitute a cognizable showing on the appellate record that the issue is moot or that a remand would be useless. Thus, we must remand the case for the trial court hold a new, valid hearing to exercise its discretion whether to strike the section 667, subdivision (a) enhancement.

We have otherwise independently reviewed the record and are satisfied that no other arguable issue exists.

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<sup>2</sup> As noted in *Scarbrough*, “There are limited exceptions to this jurisdictional divestment. For instance, the trial court may, while an appeal is pending, vacate a void judgment, correct an unauthorized sentence, or correct clerical errors in the judgment. [Citation.] Corrections to errors in the calculation of presentence custody credits may also be ordered by the trial court while an appeal is pending. [Citations.] [¶] Additionally, the trial court has jurisdiction for a period of 120 days to recall a defendant’s sentence for reasons rationally related to lawful sentencing and to resentence a defendant as if he or she had not been sentenced previously. [(§ 1170, subd. (d). . . .] The trial court also has jurisdiction to hear a writ of habeas corpus while an appeal of the challenged judgment is pending, so long as the exercise of that jurisdiction does not “interfere with the appellate jurisdiction” in the pending matter. (*In re Carpenter* (1995) 9 Cal.4th 634, 645–646.)” (*Scarbrough, supra*, 240 Cal.App.4th at pp. 923-924.)

## **DISPOSITION**

The case is remanded for the trial court to conduct a new proceeding, with defendant present represented by counsel, to consider whether to exercise its discretion to strike the section 667, subdivision (a) enhancement. In all other respects, the judgment is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.